COPY 3

Supreme Court, U.S.
FILED
JUL 11 1991
OFFICE OF THE CLERK

**91-30**

NO. 91-

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1990

---

IMPERIAL IRRIGATION DISTRICT,
*Petitioner,*
v.
STATE WATER RESOURCES CONTROL BOARD,
*Respondent.*
ENVIRONMENTAL DEFENSE FUND, INC.
*Intervenor.*

---

On Petition for a Writ of Certiorari From The
California Court of Appeal,
Fourth Appellate District, Division One

# BRIEF OF STATE RESPONDENT STATE WATER RESOURCES CONTROL BOARD IN OPPOSITION

---

DANIEL E. LUNGREN
Attorney General of
the State of California
RODERICK E. WALSTON
Chief Assistant
Attorney General
R.H. CONNETT
Assistant Attorney General
* M. ANNE JENNINGS
Deputy Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102
(415) 557-0818

* Counsel of Record

## QUESTIONS PRESENTED FOR REVIEW

1. Does the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*, preempt state regulatory authorities from exercising authority under state law to prevent waste or unreasonable use of water by those receiving water from the Colorado River?

2. Does Decision 1600 of the California State Water Resources Control Board conflict with federal statutory or decisional law governing the distribution and use of water from the Colorado River?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| I. OPINIONS BELOW | 2 |
| II. STATEMENT OF THE CASE | 2 |
| III. ARGUMENT | 5 |
| A. SUMMARY OF ARGUMENT | 5 |
| B. IID HAS MISSTATED THE FACTS AND THE PROCEDURAL POSTURE OF THE CASE. | 7 |
| C. THE FEDERAL ISSUE WAS NEITHER PRESERVED BY IID NOR DECIDED BY THE STATE APPELLATE COURT. | 10 |
| D. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEAL OPINION AND FEDERAL STATUTORY OR DECISIONAL LAW. | 11 |
| IV. CONCLUSION | 16 |

# TABLE OF AUTHORITIES

Page

**Cases**

*Arizona* v. *California*, 439 U.S. 419, 429 (1979) 6, 13

*Arizona* v. *California*, 373 U.S. 546 (1963) 12, 13

*Bryant* v. *Yellen*, 447 U.S. 352 (1980) 13

*California* v. *Federal Energy Regulatory Commission*, _____U.S. _____, 109 L.Ed.2d 474 (1990) 15

*California* v. *United States*, 438 U.S. 645 (1978) 14, 15

*Imperial Irrigation District* v. *State Water Resources Control Board*, 225 Cal.App.3d 548, 275 Cal.Rptr. 250 (1990) 2, 4, 10

*Imperial Irrigation District* v. *State Water Resources Control Board*, 186 Cal.App.3d 1160, 231 Cal.Rptr. 283 (1986) 2, 4

**Constitutional Provisions**

California Constitution, article X, section 2 3

**Statutes**

Reclamation Act of 1902, 43 U.S.C. § 383 14

Boulder Canyon Project Act,
43 U.S.C. § 617 *et seq.* i, 6, 11

43 U.S.C. § 617q 13, 14

**Other Authorities**

Report of Simon H. Rifkind, Special Master, December 5, 1960 14

NO. 91-

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1990

---

IMPERIAL IRRIGATION DISTRICT,
*Petitioner,*
v.
STATE WATER RESOURCES CONTROL BOARD,
*Respondent.*
ENVIRONMENTAL DEFENSE FUND, INC.
*Intervenor.*

---

On Petition for a Writ of Certiorari From The
California Court of Appeal,
Fourth Appellate District, Division One

# BRIEF OF STATE RESPONDENT STATE WATER RESOURCES CONTROL BOARD IN OPPOSITION

---

Respondent, the California State Water Resources Control Board, respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the Imperial Irrigation District and decline to review the subject opinion of the California Court of Appeal, Fourth Appellate District, Division One.

## I

## OPINIONS BELOW

The opinion of which review is sought is *Imperial Irrigation District* v. *State Water Resources Control Board*, 225 Cal.App.3d 548, 275 Cal.Rptr. 250 (1990) ("*Imperial II*"). That opinion upheld an administrative decision of the State Water Resources Control Board, Decision 1600. The Board's jurisdiction to adopt that decision was also upheld in *Imperial Irrigation District* v. *State Water Resources Control Board*, 186 Cal.App.3d 1160, 231 Cal.Rptr. 283 (1986) ("*Imperial I*"). A subsequent Board decision, Order No. 88-20, was not appealed by IID, was never reviewed by the California Courts, and is not before this Court.

## II

## STATEMENT OF THE CASE

The Imperial Irrigation District ("IID") is the oldest and largest irrigation district in California. It conveys water from the Colorado River through an unlined canal across the desert to the Imperial Valley, where it is used largely for agricultural purposes. The instant petition seeks review of a decision of the California Court of Appeal (*Imperial II*, 225 Cal.App.3d 548, Appendix, 3), upholding a 1984 decision by the State Water Resources Control Board ("Board"), Decision 1600. (Appendix, 151). In Decision 1600 the Board concluded that continued

diversion by IID of nearly 3 million acre feet of water from the Colorado River, of which over a third flowed into the Salton Sea and was lost to further consumptive use, without a plan to reduce those losses, constituted a misuse of water in violation of article X, section 2 of the California Constitution. (Appendix, 219-221.) Evidence presented during a six day evidentiary hearing before the Board showed annual water losses of approximately one million acre feet, over a third of all water delivered to IID. (Appendix, 186.) Witnesses were not in substantial conflict as to the magnitude of these losses, although they differed as to their cause. (Appendix, 11.)

Based on its finding of misuse, the Board ordered IID to take various corrective measures, some of which IID had already announced an intention to undertake, and to develop a water accounting and monitoring procedure to quantify the amount of water actually applied to irrigation and the amount lost through tailwater, canal spills, canal seepage and leaching. (Appendix, 221-225.) The Board did not require further specific measures, but required the District to submit a detailed and comprehensive plan setting forth how the District would propose to conserve water through various potential conservation measures, including reducing tailwater and canal spills, constructing regulatory reservoirs and lining canals.

IID sought judicial review, initially contending that the Board lacked the power to make an administrative finding of misuse. The California Court of Appeal upheld the Board's jurisdiction to adjudicate the reasonableness of IID's water management practices. (*Imperial I*, 186

Cal.App.3d 1160, Appendix, 101.)

After remand from the Court of Appeal, a hearing was held on the merits of IID's challenge to D-1600. The Trial Court upheld the Board's finding of misuse, holding both that it was "amply" supported by the evidence, and that it was within the authority of the Board. (Appendix, 48.) Upon appeal by IID, the Court of Appeal again upheld the Board's decision in the opinion of which IID seeks review. (*Imperial II*, 225 Cal.App.3d 548, Appendix, 3.)

Shortly after the Trial Court's decision in *Imperial II*, but during the pendency of the appeal, the Board held another hearing to determine what progress IID had made. IID submitted exhibits detailing its proposed water conservation plan, estimating that it could save up to 367,900 acre-feet per year over the next 35 years. (Appendix, 69-72.) That hearing resulted in Order No. 88-20. (Appendix 53.) Order No. 88-20 gave IID until January 1, 1989 to submit an implementation schedule for specific measures it would take to conserve 100,000 acre-feet per year by 1994 and to show "proof of diligent efforts to secure funding" for such conservation measures. (Appendix, 98.) *IID never appealed this order. The administrative record supporting this decision has never been before any California court, nor has any California court passed on its validity.*

Shortly thereafter, IID and the Metropolitan Water District of Southern California ("MWD") concluded an agreement whereby MWD would finance certain water

conservation measures, in return for the right to use approximately 100,000 acre-feet of water conserved by IID.[1/] IID submitted to the Court of Appeal, with a Request for Judicial Notice, copies of Order No. 88-20, the MWD-IID agreement, and a letter from the Board to IID dated March 28, 1989, stating that in light of the agreement, the Board considered IID to be in substantial compliance with the terms of Order No. 88-20. The Court of Appeal took notice of these developments in its opinion. (Appendix, 15-16.) The Court of Appeal upheld the Board's Decision 1600 on its merits and the California Supreme Court denied review.

## III

## ARGUMENT

### A. SUMMARY OF ARGUMENT

There is nothing in the subject Court of Appeal opinion which merits review by this Court. In its Writ Petition, IID has seriously misstated the facts of this case, its procedural posture and the applicable law. IID has mischaracterized both Decision 1600 and Order No. 88-20, wrongly contending that the orders taken together require IID to "pay damages" to unspecified parties. It has failed to inform the Court that Order No. 88-20 is not before this or any other court; that IID and MWD

1. MWD holds the fourth and fifth priorities to California's share of water from the Colorado River. IID jointly holds the third priority with other agricultural districts. (Appendix, 167.)

have entered into an agreement for funding by MWD of water conservation measures in return for the right to use conserved water; that the IID-MWD agreement will satisfy the terms of Order No. 88-20 at virtually no cost to IID; that this agreement has been approved by the Bureau of Reclamation and that the Board's decisions are fully consonant with draft regulations of the Bureau which look to state law in the determination of whether uses of Colorado River water are reasonable uses of water.

In addition, the federal questions which IID alleges are raised by the subject Court of Appeal decision were not argued or decided below. The Court of Appeal did not decide any of the issues presented in this petition.

In any event, there is no conflict between the Court of Appeal opinion and any applicable federal law or decision. The opinion properly recognizes the paramount role of the federal government in operating the Boulder Canyon Project, while recognizing the role that federal law allows States to play. IID's present perfected water rights have always been limited to those rights it acquired under state law. Reasonable use is a component of appropriative water rights under state law. In *Arizona* v. *California*, 439 U.S. 419, 429 (1979), IID was allocated only the quantity of water *reasonably* needed to irrigate a specified number of acres, not to exceed 2.6 million acre-feet. The Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq.*, did not give IID the right to continue unreasonable methods of use or methods of diversion of water. Draft regulations of the Secretary of the Interior confirm the role of States in determining reasonable use and

encouraging water conservation.

The petition should therefore be denied.

### B. IID HAS MISSTATED THE FACTS AND THE PROCEDURAL POSTURE OF THE CASE.

Throughout its petition, IID grossly mischaracterizes the effect of both Decision 1600 and Order No. 88-20. Decision 1600 was a relatively modest attempt by the Board, taken in anticipation of the future needs of the people of California, to prod IID to take steps to alleviate the massive losses of water caused by its lack of a modern water accounting and delivery system, lack of effective monitoring of farmers' practices and slowness in lining its unlined earthen canals. As the Court of Appeal correctly observed, the major effect of Decision 1600 was to confirm that even as old a water district as IID was subject to the mandate of reasonable use in the California Constitution, and to confirm that the final arbiter of the reasonableness of IID's practices under state law is the State and not IID itself. (Appendix, 37-40.) While IID continues to regard this decision as "next to sinister" (Appendix, 37), its characterization of the Court of Appeal opinion as in some way requiring IID to "pay damages" to unseen "urbanites" (the 15 million people who live in metropolitan southern California) is nothing short of fanciful.

IID's main complaint seems to be with Order No. 88-20, which ordered IID to develop a definite schedule for

saving 100,000 acre-feet of water a year, roughly three percent of IID's total diversions from the Colorado River. However, IID fails to inform this Court that this order was never challenged in state court by IID and is not before this Court in this proceeding. It was simply brought to the appellate court's attention by a request for judicial notice. (Appendix, 15.) Thus, even if IID's characterization were true, which it manifestly is not, a grant of the petition would not bring that order before this Court.

Neither Decision 1600 nor Order No. 88-20 required IID to expend massive amounts of its constituents' money. Both Decision 1600 and Order No. 88-20 recognized that while there were some conservation measures which IID could undertake relatively easily, the chief barrier to additional conservation measures was their cost. (Appendix, 72-79; 183, 209-210.) Accordingly, IID was encouraged to explore external sources of funding. (*Ibid.*) Contrary to IID's characterization, neither decision required IID to fund expensive capital improvements solely at its own cost for the benefit of other users.[2/] As

---

2. IID has attempted to bolster its gross mischaracterization by simply deleting from its quotations material which would interfere with its interpretation of the various documents. Most egregious are statements on pages 13 and 14 of the petition. At page 13 IID states that in Order No. 88-20 "the Board found 'that conservation of 367,900 acre-feet per annum . . . is a reasonable long-term goal which will assist in meeting future water demands.'" The elided material reads "as proposed by IID in Exhibit 25," indicating that what the Board actually "found" was that IID's proposed goal was a reasonable one. (Appendix, 97.)

Similarly, at page 14 of the Petition IID states that "the Board ordered IID 'to secure *funding* . . . of the selected water

is more thoroughly explained in the brief *amicus curiae* of the Metropolitan Water District, far from receiving "damages" from IID, MWD will actually be paying IID over $100 million over the next several years to finance water conservation measures in return for the ability to use water conserved by IID.

Moreover, as is also more fully set forth in the brief *amicus curiae* of MWD, the agreement between IID and MWD has been approved by the Secretary of the Interior, who has stated that the operational adjustments needed to implement the agreement would be made by the Bureau of Reclamation, the operator of the Boulder Canyon Project. In his letter the Regional Director of the Bureau of Reclamation commended both IID and MWD for their efforts in improving the efficiency of users of Colorado River water. (See MWD Appendix, 1-2.)

---

conservation measures *using District resources. . . .* " What the Board actually said was,

> "Imperial Irrigation District shall submit to the Board by January 1, 1989 proof of diligent efforts to secure funding sufficient to implement the water conservation measures described in Paragraph 1 of this Order. Said proof of efforts to secure funding shall consist of a resolution by the Imperial Irrigation District Board of Directors committing the District to fund implementation of the selected water conservation measures using District resources, or an executed agreement with a separate entity willing to finance water conservation measures in Imperial Irrigation District, or evidence of a comparable action which assures adequate funding for the selected water conservation measures." (Appendix, 98.)

In any event, Order No. 88-20 is not properly before this Court.

## C. THE FEDERAL ISSUE WAS NEITHER PRESERVED BY IID NOR DECIDED BY THE STATE APPELLATE COURT.

Despite IID's representations to the contrary, the federal issue which it purports to raise in this petition was neither preserved by IID nor decided by the Court of Appeal in *Imperial II.* (Appendix, 23.) In its brief before the trial court on jurisdictional issues, IID did raise the issue of federal preemption. (Appendix, 250-255.) However, in arguing the merits of the case, IID relied exclusively on state law, and in its brief before the Court of Appeal in the instant appeal, IID merely recited the history of the Boulder Canyon Project and the adjudication of IID's present, perfected rights pursuant to a decree of this Court, without raising the preemption issue.

The Court of Appeal noted that IID *could conceivably have argued* that its water rights, "based as they are upon a unique blend of statutory and contractual origins, could be characterized as somehow more stable or securely vested" than other water rights. But, the Court noted, "*IID does not, however, make this claim.* It simply contends that a right to use water, no matter how derived, once vested, becomes a property right which cannot be undermined without due compensation." (Appendix, 23,

italics added.)[3/] The federal issues were thus not properly preserved.

### D. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEAL OPINION AND FEDERAL STATUTORY OR DECISIONAL LAW.

In any event, there is no conflict between the Court of Appeal opinion in the instant case and federal statutory or decisional law. The Court of Appeal explicitly recognized that the Boulder Canyon Project Act "vested in the Secretary of the Interior the power to enter into contracts for the delivery and allocation of water to users" in the southwestern States. (Appendix, 22.) The Court of Appeal further noted that in Decision 1600 the Board "in no way interfered with IID's contractual and statutory entitlement to Colorado River water, . . ." (Appendix, 24.) What the Board did was to impose conditions on IID's use of that water after it had been delivered by the Bureau of Reclamation. Those conditions were designed to ensure that more of the water which was diverted was actually applied to beneficial uses within IID and not simply allowed to pass to the Salton Sea as excess return flow. Those conditions in no way interfere with the jurisdiction of the Secretary of the Interior to operate the Boulder Canyon Project or to allocate water through contractual arrangements. The Board most certainly did not "levy

3. IID misquotes this passage at page 4 of the Petition to obscure the fact that it did not raise the federal question before the Court of Appeal.

huge charges against IID for use of Colorado River water." (Petition, 19.) It merely required IID to take steps to use its share of Colorado River water more efficiently, and to explore sources that would assist it in doing so.

Moreover, as is stated above, the agreement between IID and MWD, which is the vehicle which IID finally selected to comply with the Board's directives, was explicitly approved by the Bureau of Reclamation. It was also approved by the other parties to whom California's share of Colorado River water has been allocated.

The Board's decision and the Court of Appeal opinion are also consistent with current federal policies. Recognizing the need for conservation to increase the ability of the several States to meet their needs with current supplies from the Colorado River, the Secretary of the Interior has drafted regulations which specifically look to the States for assistance in determining whether users of Colorado River water are complying with state law in applying Colorado River water to beneficial use and in improving water conservation. (MWD Appendix, 10-13, 16-19.) Although these are proposed regulations which have not yet been formally adopted, the Regional Director of the Bureau states in his transmittal letter that they formalize "existing management and operational requirements and guidelines." (MWD Appendix, 5.)

The Court of Appeal opinion is also consistent with relevant decisions of this Court. In its decision in *Arizona* v. *California*, 373 U.S. 546 (1963), this Court affirmed

Congress' delegation of authority to the Secretary of the Interior to allocate water from the Boulder Canyon Project and to assure efficient operation of the project. 373 U.S. at 609. But it also recognized that Congress had given the States authority in Section 18 of the Boulder Canyon Project Act, 43 U.S.C. § 617q, to take actions not inconsistent with the Act or with federal officials' management of the River. 373 U.S. at 588.

Not only are IID's water rights under state law subject to the constitutional mandate of reasonable use, IID's "present perfected rights" as confirmed by the Special Master and this Court in *Arizona* v. *California*, 439 U.S. 419, 429 (1979), are to an amount of water "not to exceed (i) 2,600,000 acre-feet . . . or (ii) the amount *reasonably* required for irrigation of 424,145 acres," whichever is less. (Italics added.)

Furthermore, this Court noted in *Bryant* v. *Yellen*, 447 U.S. 352, 371-372 (1980), that

> "in providing for these [present perfected] rights the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree."

No conflict is created between state and federal law because IID's contract rights under federal law are also limited to the amount "reasonably required for potable and irrigation purposes." (Appendix, 374a.)

As MWD observes in its brief *amicus curiae*, the Special Master noted in his 1960 final report that due to a surplus of supply over demand, much of the water diverted from the Colorado River was wasted, specifically mentioning the large return flows which passed unused to the Salton Sea. He noted that precisely those measures later ordered by the Board in Decision 1600 could reduce the amount of water needed to satisfy California's then-existing uses. (Report of Simon H. Rifkind, Special Master, December 5, 1960, p. 103, n. 25.)

The Court of Appeal opinion is also consistent with this Court's decision in *California* v. *United States*, 438 U.S. 645 (1978). In that decision this Court affirmed Congress' intent that States be allowed to take regulatory actions respecting federal reclamation projects, including the definition of water rights, that do not interfere with the accomplishment of federal objectives or conflict with clear congressional directives, construing Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383. Section 18 of the Boulder Canyon Project Act is patterned after Section 8 of the Reclamation Act of 1902, and reflects the same congressional deference to state water rights law.

The Court of Appeal opinion is similarly not in conflict with this Court's recent opinion in *California* v. *Federal Energy Regulatory Commission*, _____ U.S. _____, 109 L.Ed.2d 474 (1990). *California* v. *FERC* drew a distinction between federal law respecting reclamation projects and the Federal Power Act. The Court found certain conditions imposed by the Board in permits to

operate hydroelectric plants to conflict with conditions imposed by FERC in granting its license. The Court held that in the event of such a conflict, state regulatory actions were preempted. _____ U.S. at _____, 109 L.Ed.2d at 491. This Court did not, however, use that case to reexamine its holding in *California* v. *United States, supra* regarding reclamation projects.

In the instant case, there is no conflict between the Board's Decision 1600 or the Court of Appeal opinion and federal law. Nothing in either the Board decision or the Court of Appeal opinion creates an actual conflict with federal law such that IID cannot obey both. On the contrary, the Board's encouragement of conservation efforts by IID is consistent with this Court's decisions confirming IID's water rights and consistent with federal policy. Far from effecting a "wholesale reallocation" of Colorado River water, IID's implementation of the Board's directive through its agreement with IID has the approval of the Secretary of the Interior. IID is able to suggest that such a conflict exists only by grossly misrepresenting the effect of the Board's decision and distorting its factual and legal context. Under the circumstances, no useful purpose would be served by granting IID's petition.

## CONCLUSION

The Board's 1984 decision ordering IID to take steps to improve water efficiency was a reasonable and balanced attempt to bring California's oldest irrigation district into the modern period. It is consistent both with California law and with applicable federal statutory and decisional law.

As California finds itself in an unprecedented fifth year of drought, it is evident that the Board's foresight in attempting to improve water availability through conservation was well justified. IID's insistence that it and it alone should be the sole judge of the reasonableness of its operational practices, in the face of uncontested evidence that those practices resulted in losses of nearly one million acre-feet of water a year, is at best an anachronism.

Further, the petition raises issues which were not preserved below and which would not properly be before the Court even if the petition were granted.

IID's Petition is without merit and should be denied.

Dated: July 10, 1991

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of
the State of California
RODERICK E. WALSTON
Chief Assistant
Attorney General
R.H. CONNETT
Assistant Attorney General
M. ANNE JENNINGS
Deputy Attorney General

Attorneys for Respondent
California State Water
Resources Control Board